

voluntarism and statism. A statist view of international law, however, is difficult to reconcile with a multitude of nonstate transnational actors who, as a sophisticated legal process analysis would show, now have had a significant impact on international law. Voluntarism, the idea that consent is the cornerstone of the consensual basis of all international law, appears an increasingly unjustifiable premise in the study of contemporary international legal phenomena. As Philip Allott has noted: "[The] notion of consent is no longer able to contain and sustain the reality of the post-1945 development of international self-government."¹

In concluding, then, I would like to stress again that the fault-line of the changes experienced in the international legal system runs straight through the sources of international law. Indeed, soft law epitomizes the shifting characteristics of the international legal order. To understand soft law requires an understanding of this larger context.

REMARKS BY W. MICHAEL REISMAN*

The commonplace conception of lawmaking in domestic political systems, the enactment of legislation by highly specialized and routinized political institutions, is utterly inappropriate for an inquiry about lawmaking in a much more complex and varied international political system. A substantial body of international law, as we know, has not derived from formal institutions. Specialized and routinized international political institutions that purport to engage in lawmaking are only one, often marginal, sometimes very questionable, setting for lawmaking. So any inquiry that we undertake, as Professor Handl has just observed, must go back to some functional components.

Natural lawyers have concentrated on the deliberative, consensual processes by which preferred policy is clarified, and that certainly is an important part of lawmaking. Positivists have focused on organized political power as the distinguishing feature of legislation. In fact, lawmaking is both of these, and much more. Lawmaking at any level of social organization, and whether it is accomplished in a formal or informal, organized or unorganized setting, refers to the processes in which expectations of authority, and communications about intentions of control—the intention to make that authority effective—are generated and mobilized to sustain certain policy formulations, which are themselves designed to affect human behavior.

Whenever we talk about law, and I submit to you, in whatever jurisprudential mode, we are speaking about a communication of these three related elements: content, asking you to do or forbear from doing something; certain signals of authority that distinguish this as law from other statements in the subjunctive mood; and finally, communications of intention to make that effective, and to distinguish it from all the "you ought's" and "you should's" that bombard us every day. We do not have to talk at great length about the need for a legislative content; obviously law would be meaningless unless it told us to do something. The notion of authority signals does not require much elaboration. When we refer to the authority of an arbitrator or a court to do certain things, or the authority of the Security Council or the absence of the authority of the General Assembly, we have a fair idea of where the boundaries of authority in lawmaking begin and end. The question of control intention does not require great elaboration. John Austin talks about this in terms of sanctions. But simply attaching a sanction to a statute or to some other instrument does not make it

¹Allott, *Power Sharing in the Law of the Sea*, 77 AJIL 1, 25 (1983).

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self-enforcing. Those who have effective power in a particular setting must be willing and able to deploy the force at their disposal to make something minimally effective, in order for us to distinguish it from other statements in the subjunctive mood and conclude that "this is law."

In contemporary international legal scholarship, soft law has come to refer to a diverse range of phenomena related to lawmaking and frequently presented as law. For some scholars, the phenomenon is supposedly so lacking in the third component, control intention, as to be mislabeled law. These same scholars are apparently unaware that scholars in many weak and small states view some very "hard" law, that is, communications backed by compelling control intention but of questionable authority, as naked power. In fact, law can be soft in all its dimensions: in terms of its content, in terms of its authority, and in terms of control intention.

Let me give you one example of a formula that is very soft in terms of its content. In 1951 the International Court of Justice, purporting to establish limits on what a state could do in establishing straight baselines, said as follows: "[W]hile such a state must be allowed the latitude necessary in order to be able to adapt its delimitation to practical needs and local requirements, the drawing of baselines must not depart to any appreciable extent from the general direction of the coast." "General direction of the coast" is not defined, "appreciable extent" is not defined, "departure" is not defined; this becomes in many ways a very permissive formula. It is very soft in terms of content.

Authority signals can be soft as well. We know, for example, that when the Security Council is discharging its function to maintain the peace it is operating on a very firm authority base. We know that when the General Assembly purports to make new law, or to resolve matters that have not been assigned to it, its authority, though it may be present in some fashion, is much more ambiguous; it is softer.

And of course, we all know of many cases of law that is legislated, as Professor Handl has just expressed it, without capacity to put it into effect. In this respect, we encounter softness in terms of sanction or control intention.

Soft law in all these senses is presented as a new, unusual, and pathological phenomenon. The term is new, but what it refers to is not, nor is it a quintessentially international phenomenon. Although like anything else it can be abused, it is not per se a legal pathology. In some circumstances, it may perform very important legal functions. The prevalence of the phenomenon appears to have complicated the work of international lawyers enormously, but I submit to you that the complications derive less from particular uses of soft law and more from the nature and complexity of international law itself. It is interesting to note that many of the people who use the term "soft law" pejoratively often are concerned less with the alleged fictitious character of certain prescriptions that purport to be law (after all, if they are fictitious, why worry about them?), and much more with the redistribution of political power in certain arenas of international lawmaking. That is sometimes one of the unexpressed targets of criticisms of soft law.

Normal normativity is not, as Professor Weil's very important essay contends, something that is monolithic, or unidimensional. Relative normativity is in no sense exceptional. The ego is constantly bombarded by many different communications in the subjunctive mood, and the ego constantly makes assessments of which ones are important, which ones one can run a risk of violating, and so on. We know that in various ways all the norms we are subjected to as individuals, and the norms that we are subjected to as advisers to more composite entities, are soft in various ways, and

we make calculations as to which must be complied with and which must not. We have, in other words, a sliding scale of hardness or softness in all norms.

That sliding scale serves very important policy purposes. A totalitarian system, as its name imports, seeks to regulate every facet of social process with prescriptions accompanied by severe sanctions. Liberal and democratic systems prescribe with restraint and severely sanction only those matters that are indispensable for the protection of public order. All other social orders, or social sectors, are not characterized by anormativity. That is an impossibility. As the Romans said, *ubi societas ibi jus*—wherever we have a social arrangement we have law. Rather, they are characterized by norms that are supported by relatively mild sanctions, softer norms, if you like. Viewed from this angle, variability of sanction is not pathological but an important tool for refined and nuanced sociolegal engineering. As we will see, many so-called soft international norms are actually intentionally and functionally soft. They would be unworkable were they made much harder. Distinctions between degrees of control intention and severity of sanction are extremely important for scholars and practitioners.

International law classically provides us with many examples of soft law. One may be found in the corpus of comity, or *comitas gentium* norms in the international system whose violation is not delictual, but is nonetheless seen as an unfriendly act. Violations of comity may serve as a way of communicating displeasure, and indicating the unwillingness of one state to accept the actions or demarches of another. All the actions traditionally grouped under retorsion are essentially norms of comity. They are soft, and yet they perform a very important function within the international system.

In some cases, drafters intentionally select a soft formula or achieve the same effect by adopting a soft means of enforcement. Consider international jurisdiction allocations in the *Restatement*. A formula that allocates the same competence to two competing states might be viewed as so soft as to be normatively meaningless. But if the allocation were made exclusively to one state or the other, the entire drafting exercise would be disrupted.

As a last example, consider trade agreements between advanced industrial democracies. Because domestic economic disruptions have an internal political dimension, prudent governments on both sides of the agreement are reluctant to lock themselves into binding arbitral or adjudicative dispute resolution mechanisms. All parties appreciate that disruptions that lead to unilateral departures from the agreement often are driven by powerful domestic forces. A hard dispute resolution mechanism will yield a hard answer, but the loser will repudiate it to the detriment of the rest of the agreement, other agreements, and possibly to the fabric of international trade. Soft dispute arrangements, then, are not pathological. They are not imperfect; they serve a purpose in this context.

The point was made with extraordinary clarity by Sir Joseph Gold in an article five years ago in the *American Journal of International Law*.² Sir Joseph said that it is too easy to be condescending toward soft law. Soft law can overcome deadlocks in the relations of states that result from economic or political differences among them, when efforts at firmer solutions have been unavailing. A substantial amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing, countries. Much soft law therefore is to be found in the law of universal international organizations, including the decisions of their or-

²⁷⁷ AJIL 443 (1983).

gans. Sometimes, Sir Joseph says, soft law may be the only alternative to anarchy. And though I would disagree with him when he says that soft law has the capacity to become hard law, I disagree because it seems to me to be beside the point. Even if soft law does not harden up, soft law performs important functions, and, given the structure of the international system, we could barely operate without it.

Normativity varies in three other ways that complicate the discussion of what is now referred to as soft law. One phenomenon has to do with the confusion of promoting new law and actually making new law. Because international law for the most part is made in customary processes, the line between the agitation for new norms and when those new norms become accepted is extremely blurred. In some cases it is consciously blurred by us, when we go out of our way to present something that is in the process of becoming law as law. Political scientists recently have become interested in this whole prelegislation phase: the ways and the reasons why some vague, popular discomfort slowly takes a political vector and becomes an insistence on legislation. We have not done it in international law. If we did we might be able to identify some of the ambiguous uses of soft law.

Another manifestation of this phenomenon has to do with the prevalence of aspirational norms in contemporary international law. In many settings we have norms that are created with no intention of making them effective. That does not mean that they are not legally important, or that they do not serve some purpose, but there is no question that they are not intended to be effective. No techniques for enforcement are established. These very soft norms often are used as a compromise. In the 19th century, they were referred to as *voeux* at conferences. We now put them in the ordinary legislative formula, which may become somewhat confusing, particularly when particular groups wish to rely on them.

In some cases, complementarity, built-in contradictions that make particular norms ineffective, is not accidental but is a consciously premeditated technique used by legislators. It was Rudolph von Jhering who was the first to observe that contradictory and incompatible legislation in a single political system is not an accident but is designed to accommodate incompatible and powerful political interests, by giving legal expression to each of the claims and transferring to the courts or other applicative agencies the competence to strike politically appropriate balances in each case. In this respect I would disagree respectfully with Professor Willem Riphagen who tends to view the proliferation of contradictory soft norms as an international legal system run amok. It is not very tidy, but it serves a very important homeostatic function.

Soft law can be found in many systems, but the phenomenon in international law seems to be increasing for a number of reasons. First, the elites who compose the politically relevant strata of the international system, for all their diversity, share a consuming interest in maintaining power. This becomes the basis for agreement. But the various elites of the international system respond to constituencies marked by radically diverse levels of development and aspiration. While elites may find it possible to reach private agreements among themselves that maximize their own interests, public lawmaking must promise the fulfillment of the unrequited popular demands. This factor may account for the proliferation of normative formulations that are produced in international fora, despite the fact that their proponents know well that there is no way of implementing them. This particular factor, accounting for the increase of soft law, is aggravated by the extraordinary gap between aspirations, many of them cynically cultivated by elites, and the possibilities for their realization. Limitations on the availability of resources for implementation mean that it is sometimes better just to spin out law as a way of creating a sort of surrogate or ersatz satisfaction.

The rapid growth of soft law and complaints about it are, in large part, a concern of the developed countries. Part of it has to do with the deep dissatisfaction that we feel at the shift of power within formal lawmaking arenas, in which we are a numerical minority. We discover that many of these fora make law we do not like. This law, we insist derisively, is soft. This may be a valid complaint, but those who are making this soft law also have a valid complaint. From their perspective, customary law, which we would consider very hard, is in fact law that is created primarily because of the great power that we in the industrial world exercise over others. There are really two sides to the controversy over soft law. It is important, when we criticize it, to appreciate that there are others on the other side of the mirror who are looking at it quite differently.

Despite all these criticisms, soft law does perform certain positive functions, in a world that is deeply divided. Thanks to soft law, we still have people channeling efforts toward law and toward trying to achieve objectives through the legal mechanism, rather than going ahead and doing it in other fashions. This, in itself, represents some reinforcement of the legal symbol and, at least, prevents or retards the use of violence to achieve aims. On the hand, most of the law that is made this way cannot be fulfilled in any effective fashion, and this will have a long-term cost. Like Gresham's law in economics, bad law may drive out good law. The excessive use of soft law, which is dictated by certain compelling exigencies now, may ultimately weaken the entire international lawmaking system.

REMARKS BY BRUNO SIMMA*

My first remark aims at the view that in a certain way reduces the totality of international human rights to soft law. I am referring to the more or less official view in Socialist circles, according to which treaties for the protection of human rights must be considered "decoupled" from the body of the general international law of state responsibility and countermeasures, to the effect that the only means of securing compliance with such treaty obligations are those embodied in the treaties themselves, or attached thereto. If you take a hard look at such treaty-based procedures, and their acceptance, for instance in the case of the International Covenant on Civil and Political Rights,¹ we find that the vast majority of the states parties to the Covenant, including all the Warsaw Pact countries, have accepted one single implementation mechanism, namely a reporting procedure. This reporting procedure does not provide for any ad hoc investigation of human rights violations. It cannot be initiated by another contracting party wishing to induce a defaulting state to resume performance nor can it be regarded as anything resembling a countermeasure against treaty breaches, no matter how serious these breaches may be. Viewed against this background, the Socialist thesis of human rights treaties as so-called self-contained regimes deprives human rights treaties of virtually any sanctions.

Against such attempts to defuse international human rights law, in my view it has to be maintained that as a matter of principle, multilateral treaties for the protection of human rights, like other treaties, embody correlative rights and obligations among their parties; every party therefore is bound legally to perform the treaty obligations vis-a-vis all other parties, and every party to such a treaty is entitled to demand performance by any other contracting party and, within certain limits, to enforce compliance after eventual treaty-based remedies have been exhausted without success.

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¹6 ILM 368 (1967).